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IN THE

Supreme Court of the United States

October Term, 1948

No. 516

DAVID KLOR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

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Statement of the Case.

Petitioner seeks a Writ of Certiorari to the Supreme Court of the State of California upon an opinion of that Court affirming the judgment of his conviction. (*People v. David Klor*, 32 A. C. 675, 197 P. 2d 705.)

Petitioner was charged by information with the crime of Assault With a Deadly Weapon With Intent to Commit Murder, a felony, on one Kenneth Temple. He pleaded Not Guilty as Charged in the Information, was tried by a jury and convicted of Assault With a Deadly Weapon, a felony, a lesser and included offense than that charged.

From this judgment he appealed. The ground upon which he bases his present petition is that the District

Attorney committed prejudicial misconduct. The cause was orally argued before the District Court of Appeal of the State of California, Second Appellate District on January 21, 1948 and on March 9, 1948 that court rendered an opinion affirming the judgment of conviction. Petitioner sought a rehearing before the District Court of Appeal which was denied on March 19, 1948. Petitioner then petitioned for a hearing before the Supreme Court of the State of California which was granted on April 1, 1948. On June 17, 1948 the cause was orally argued before that Honorable Court and on September 28, 1948 it affirmed the judgment and rendered its opinion. Petitioner then sought a rehearing which was denied on October 25, 1948. From the judgment and opinion of the Supreme Court of the State of California petitioner now seeks this review.

Statement of the Facts.

Defendant Klor was engaged in the jewelry business at 317 West Fifth Street, Los Angeles, California, the firm being known as Peters Jewelry Company. His store was located some three-quarters of a block west of Broadway Street. [Rep. Tr. p. 102.] The victim, Kenneth Temple, was employed by the C. H. Baker Shoe Company, at 451 South Broadway, which is located just around the corner from the jewelry store operated by the defendant. [Rep. Tr. p. 27.] One Virginia Lazo was employed at the C. H. Baker Shoe Company store, this being the same place as that where Temple worked. [Rep. Tr. p. 80.] On June 12, 1946 Miss Lazo, between 10:15 and 10:20 a. m. went to the Peters Jewelry Company store for the purpose of looking at a wrist watch and had a transaction with one Goldman, an employee of the defendant Klor.

At this time there was present in the store Mrs. Klor who is the wife of the defendant, Mr. Howard Sogg, Mr. Goldman, Miss Lazo, and outside on the sidewalk was the defendant Klor. [Rep. Tr. pp. 8-9.] Shortly after Miss Lazo entered the store Mr. Temple came in and spoke to Miss Lazo and she and Mr. Temple then left the store. Immediately thereafter Mr. Klor came into the store and had a conversation with Mr. Goldman. According to Goldman, the following was the conversation:

> "A. He asked me what happened, he was standing right by the doorway and he came in and said, 'What happened?' And I told him that Miss Lazo, who was buying a watch from me, just about had bought the watch, and this man came in and said something to her, and I was repairing a band, or changing a band on the watch, and when I heard this other party come in, when I heard him speak, that is the first I knew of him being in there, I didn't see him come in. I lifted my face up, and he said, 'Is that the watch you are buying?' And I said . . . " [Rep. Tr. p. 11, lines 15-24.]

> "A. I told him that he picked up this watch, he looked at it, compared it with his own watch, more or less threw it back at me, and he said, 'Come with me,' and took her by the arm and they walked out. I also told him that she had been a satisfied customer prior to this, that she had said she bought a watch or two there before, a clock or two, but she had been a satisfied customer." [Rep. Tr. p. 12, line 25, to p. 13, line 5.]

The defendant then asked his wife what the telephone number was of the C. H. Baker Company, she looked up the telephone number, and he called up this telephone

number she had given him and spoke over the phone. [Rep. Tr. pp. 13-14.] After this first telephone conversation, the defendant asked his wife for the telephone number of the Fifth Street Baker's store and then went to the telephone and made a second call. After having hung up from the second telephone call, he then went to the second showcase from the phone and got a 32 Smith and Wesson revolver. The defendant then began waving the gun back and forth, up and down, and aiming at the door. Goldman then observed Mr. Temple at the doorway, not quite all the way in the store and he saw Klor raise the gun again, wave it around and point it toward the doorway. Temple then turned around and ran toward Broadway, and the defendant pursued him. Goldman heard four or five loud noises resembling the firing of a gun. [Rep. Tr. pp. 15-19.] Temple ran from the jewelry store back to the Fifth Street C. H. Baker Shoe Store where he was employed, he was pursued the entire way by defendant who fired shots at him, one shot went through the left lung, the bullet entering the back and coming out the front, and he was shot three times in the left arm and one time in the right arm. [Rep. Tr. pp. 29-31.] Temple had on a grey gabardine coat which was pierced by bullets. [Rep. Tr. p. 36.] Police Officer Harry Lank was, at the time of the shooting, directing traffic at the intersection of Fifth and Broadway. The time, according to him being approximately 10:55 a.m. He observed the defendant chasing Temple and heard four pistol shots. He heard some shouting, but could not understand what was being said. Temple at this time was approximately ten feet ahead of defendant. Officer Lank then drew his gun and went after the defendant and Temple and disarmed the defendant. The

defendant threw the revolver on the ground. Lank awaited the arrival of his partner, Officer Schmidt, and then went inside the Baker store to investigate. Officer Lank later examined the gun that was taken from the defendant and ascertained that there were four 32 long and one 32 short empty cartridges in the gun. [Rep. Tr. p. 53.] Two other witnesses saw the shooting, they being Officer Schmidt and a bystander, Sheldon Freed. [Rep. Tr. pp. 85-86, 65-69.] After Officer Lank went inside the C. H. Baker Shoe Store, he saw Temple lying down on the floor and observed his wounds and proceeded to search him for a weapon, but didn't find any. Officer Lank then went outside and had defendant brought into the store and at that time had a short conversation with the defendant, the defendant stating that Temple had stolen a watch from him. [Rep. Tr. pp. 54-56, 58.] Officer Lohrman later that day went to the defendant's jewelry store and obtained from Mr. Goldman the watch which he had displayed and talked with Miss Lazo about. [Rep. Tr. pp. 92, 20.] Later on Officer Lohrman had a conversation with the defendant at the City Hall, at which time the defendant readily admitted the shooting, claiming, however, that he was justified in doing it. [Rep. Tr. p. 98.]

The defendant knew who Miss Lazo was and where she worked. [Rep. Tr. p. 21.] And contrary to his statement, he was not working on a tray of watches at the time that Temple came in on the second occasion. [Rep. Tr. p. 22.]

The defendant's testimony was that around 11 a. m. on June 12, 1946 he was inside his store putting watch bands on watches on a tray, he being behind the show-

case, and that he first noticed Temple when he was right up close to the tray where the defendant was working. [Rep. Tr. pp. 103-104.] That he heard a sound and looked up into the ceiling and saw a man approach and swing at him and say, "I'll take this watch for nothing," but he backed out of the way, was not struck; that Temple then began to run and said, "What are you going to do about it?", whereupon he, defendant, shouted "stop thief" and reached for the gun, which was under the showcase in a holster; that he, the defendant, then ran out of the store pursuing Temple and shouting "stop thief"; that he fired one shot in the air to frighten him, but Temple did not stop, and so he continued to shoot at him and pursue him. [Rep. Tr. pp. 104-106.] The defendant stated that Temple had the watch in his hand while he was running, and further that he did not know that he had hit Temple with a bullet. The defendant further testified that after the conversation he had with Mr. Goldman about Miss Lazo, that he telephoned the main offices of the Baker Shoe Company, spoke to a woman and asked her what the name of the manager of the Fifth Street C. H. Baker's store was and she gave him the name of Kenneth Temple; that he then called the Fifth Street store and spoke to a woman and then to a man whom he addressed as Temple, but he stated he did not know whether it was Temple or not; that he told the man on the other end of the phone that it is unfair and unethical to drag customers out of a store and that the man on the other end of the phone started using vile names about him and he, the defendant, then hung up. [Rep. Tr. pp. 108-110.] He further testified that when he was talking with the unknown man at the C. H. Baker store, that when he made statements about ethics,

that they were directed about the transaction which was had in his store with Miss Lazo. [Rep. Tr. pp. 111-112.] The defendant further testified that at the time Kenneth Temple came into his store after the telephone conversation, he did not know that he was the same person with whom he had talked on the phone. [Rep. Tr. pp. 112-113.]

Comment.

It is to be noted that the watch which petitioner claimed that his victim attempted to steal was at all times in the jewelry store. The first entrance made into the jewelry store by the victim was when the watch was passed back to the clerk and the victim left. The second time that the victim came to the store, he did not get inside the door before he turned around and ran with petitioner in pursuit. The watch was recovered shortly after the assault at the jewelry store by a police officer. It is also to be noted that Mrs. Klor was present and participated in much of the performance prior to the assault. There is no doubt of petitioner's guilt.

Due Process of Law.

Petitioner contends that misconduct of the District Attorney in the trial court denied him due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. He bases his contention before this Honorable Court on the fact that Section 1322 of the Penal Code of California prohibits the testimony of either a husband or wife for or against the other without the consent of both and that because of the misconduct of the District Attorney the provisions of this section were violated thereby denying him a fair trial. From that he reasons that the Supreme Court of

the State of California by affirming the judgment of the trial court has, though acknowledging misconduct, ruled that such misconduct is not a violation of due process of law, thus depriving him of a fair trial.

The first instance in which petitioner claims that the District Attorney committed prejudicial error, thereby denying him a fair trial, was simply this: During the course of the trial the prosecuting attorney in open court called the name of the defendant's wife as his next witness. The defendant's wife was either not present or did not answer to the call. Defense counsel then asked the question, "Have they abolished 1881, your Honor?" The District Attorney then stated that that was a privilege that must be claimed. The Court asked whether Mrs. Klor, the defendant's wife, had been subpoenaed. Defense counsel answered that he had never heard of it. The Court again asked whether Mrs. Klor had been subpoenaed as a witness; the District Attorney failed to answer and called his next witness. [Rep. Tr. p. 84, lines 1-16.] (Section 1881 of the California Code of Civil Procedure, deals with privileged communications and provides with certain exceptions that a husband cannot be examined for or against his wife without her consent nor can a wife likewise be examined against her husband without his consent as to communications made to one another during the marriage. This section was clearly not applicable under the circumstances.)

Section 1322 of the Penal Code of California provides as follows:

> "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or . . ."

While it may be conceded that the nicer way to have called upon the wife of the defendant as a witness would have been to have first consulted with the defense counsel, the mere fact that the District Attorney did not choose to so proceed does not constitute prejudicial misconduct or error. In California the prohibition against a husband or wife testifying for or against the other in a criminal action has certain exceptions and is a privilege which can be waived, and on many occasions is waived by either one or the other. Where the prosecution desires to use the husband or wife of a defendant as a witness for the People, the proper procedure is to call the witness to the stand, have the witness sworn and proceed with the examination. If no objection is made, then consent is presumed. The Supreme Court of the State of California so ruled in petitioner's case (*People v. Klor*, 32 A. C. 675, 679, 197 P. 2d 705, 707), and has further ruled in the same manner in the following cases:

People v. Moore, 111 Cal. App. 632, 295 Pac. 1039, 1040;

People v. Singh, 182 Cal. 457, 483, 188 Pac. 987, 998;

People v. Briggs, 20 Cal. 2d 42, 46-47, 123 P. 2d 433-434.

The second misconduct complained of is that during the argument to the jury the District Attorney made comment about the fact that defendant's wife, Mrs. Klor, did not choose to testify [Rep. Tr., Vol. II, p. 12, line 6, to p. 13, line 15] and by thus doing he could not have failed to create in the minds of the jury a belief that the prosecutor had knowledge that the wife's testimony would have been adverse to the defendant had she

testified and that regardless of the Court's statement, the petitioner was responsible for the wife not being present to testify.

The Supreme Court in petitioner's case held that the conduct of the District Attorney, both in calling the wife in the manner that he did and his comment before the jury in his argument, was "improper and unwarranted." However, that in view of the fact that the trial court instructed on the necessity of calling witnesses, and admonished the jury during the argument, and the petitioner was obviously guilty, they could not hold that the claimed misconduct was so improper as to require a reversal. The Supreme Court in that respect was merely following its expression of principles given in a previous case.

People v. Briggs, 20 Cal. 2d 42, 46, 123 P. 2d 435.

Petitioner has cited one case that at first blush would appear to be on all fours with his case. (*Graves v. U. S.*, 150 U. S. 118, 120, 14 S. Ct. 40, 37 L. Ed. 1021.) That case, however, is easily distinguished from petitioner's case in view of the fact that there the wife was not a competent witness either in behalf of or against her husband and if she had been brought into Court, neither he nor the Government could have put her on the stand. Such is not true so far as the California statute is concerned. Section 1322 of the Penal Code is a privilege which may be waived and either the husband or the wife may therefore become a competent witness. The attention of this Honorable Court is invited to the strong dissenting opinion written in that case by Mr. Justice Brewer at pages 122, 127 of 150 U. S.

Admitting that the conduct was "improper and unwarranted" the sole question presented by petitioner is whether such conduct was so "improper and unwarranted" as to deny him a fair trial within the concept of the Fourteenth Amendment. It does not necessarily follow that because the District Attorney's conduct was "improper and unwarranted" that it was so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law.

Authorities.

A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. (Corpus Juris Secundum, pp. 1185 *et seq.*) There is a failure to observe "that fundamental fairness essential to the very concepts of justice" when a trial is but a pretense. (*Lisenba v. California*, 314 U. S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166), as a trial dominated by a mob; (*Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543), or when the defendant is denied the right to counsel. (*Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461), or when his conviction results from testimony known by the prosecution to be perjured. (*Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406), or from an involuntary confession obtained through coercion or torture. (*Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716; *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.) In petitioner's case the fact that the District Attorney committed acts which were "unwarranted and improper" in no way precluded the Court from rendering a fair and impartial verdict.

Due process of law is process due according to the law of the land. This process in the state is regulated by the law of the state.

> *Holden v. Hardy,* 169 U. S. 366, 385, 18 S. Ct. 383, 385, 42 L. Ed. 780.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line.

> *Holden v. Hardy, supra* (169 U. S. 366, 18 S. Ct. 383, 386);
>
> *Hurtado v. State of Calif.* (110 U. S. 516, 4 S. Ct. 111, 121).

The due process clause of the 14th Amendment does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.

> *Twining v. New Jersey,* 211 U. S. 78, 112, 29 S. Ct. 14, 25, 53 L. Ed. 97.

As is stated in *Lisenba v. People of State of California,* 314 U. S. 219, 62 S. Ct. 280, 286,

> ". . . The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law."

In *Snyder v. Commonwealth of Massachusetts,* 291 U. S. 97, 122, 54 S. Ct. 330, 338, 78 L. Ed. 674, it is stated:

> "The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.
>
> "The Constitution and statutes and judicial decisions of the commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (citing cases) wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

While admitting that petitioner presents a Federal question, it is obvious that it does not present such a sub-

stantial question as would require this Honorable Court to exercise its jurisdiction.

Zucht v. King (1922), 260 U. S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194;

36 C. J. S. 156, Sec. 247.

Petitioner, in his brief in support of petition, attempts to state four propositions wherein he contends that due process of law was violated. (1) Does a state violate due process of law where its statute prohibits the use of a wife's testimony against the husband, and nevertheless the prosecutor is permitted to bring that fact before the Court and jury in an unauthorized manner. (Pet. for Wr. of Cert. p. 13.) (2) That the decision, opinion and judgment of the Supreme Court of California erred in its construction and application of Section 1322 of the Penal Code of California forbidding the use of a wife's testimony in a criminal proceeding against her husband and permitting the failure of the wife to be present to be used to bring about the conviction of the accused. (Pet. for Wr. of Cert. p. 17.) (3) That the Supreme Court of California erred in its decision, opinion and judgment in holding that, even though unfair methods were used in the very presence of the Court and jury, such methods constituted due process of law (Pet. for Wr. of Cert. p. 17); and (4) That the Supreme Court in its opinion and judgment erred in holding that the jury had a right to infer guilt from the failure of the defendant to produce his wife as a witness and from the silence of her testimony in the courtroom it erred in holding that such procedure constituted due process of law and fair trial within the Fourteenth Amendment of the Constitution of the United States. (Pet. for Wr. of Cert. p. 21.)

The posing of these propositions merely restates in a different way the basic problem as to whether or not the complained-of conduct was such conduct as denied the petitioner a fair trial under the Fourteenth Amendment of the United States Constitution.

In answer to the first question, the argument heretofore given clearly shows that under the facts of this case, the opinion and judgment do not violate due process of law, nor does petitioner's case present such a substantial Federal question as would call for this Honorable Court to take jurisdiction.

In answer to petitioner's second contention, the Supreme Court of the State of California did not err in its construction and application of Section 1322 of the Penal Code, first, because the Supreme Court in its opinion did not in any way prohibit the provisions of Section 1322 of the Penal Code of California from being completely operative. As can readily be seen from the facts of this case, the proceedings never reached the point, where the privilege as such would have been exercised; second, the Supreme Court of California did not hold, as stated in the proposition posed by petitioner, that Section 1322 of the Penal Code could be used in any way to permit the failure of the wife to be present as a witness to bring about the conviction of the accused. The Court held that the petitioner had all the rights and privileges given by Section 1322 of the Penal Code and specifically condemned the prosecuting officer for his conduct, but said that even though his conduct was "improper and unwarranted" that in the opinion of the Court it did not cause his conviction and it was not such conduct as would have changed the decision of the jury, under the facts of the case. This

is clearly a different situation than the one which petitioner poses in his Point II.

Petitioner cites *DeJonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278, for his authority on this point. (Pet. for Wr. of Cert. p. 17.) That case involves personal liberties. There the Court held that the construction of the Supreme Court of the State of Oregon of its Criminal Syndicalism Statute in upholding a conviction was a denial of due process because it would permit conviction upon a charge which was not made. Clearly, that case is not applicable. Petitioner in this case was convicted of assault with a deadly weapon, a felony, being a lesser and included offense of the one with which he was charged, to wit: Assault with a Deadly Weapon With Intent to Commit Murder.

In answer to petitioner's third point, it must be emphasized that fair and unfair methods are matters of degree and that it is not every unfair tactic which would call for the application of the Fourteenth Amendment. Procedure does not run afoul of the Fourteenth Amendment because another method may seem fairer or wiser or give a surer promise of protection to a prisoner at the bar; that a rule of procedure may work particular hardship on a particular defendant does not make the rule wanting in due process.

> *Snyder v. Massachusetts, supra,* 291 U. S. 97, 105;
>
> *Ownbey v. Morgan,* 256 U. S. 94, 111, 41 S. Ct. 433, 65 L. Ed. 837.

Appellant cites *New York Central Railroad Co. v. Johnson,* 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706. This was an action for damages for injuries on a rail-

road. During cross-examination of the plaintiff defense counsel attempted to elicit the information from her that her injuries were due to syphilis, rather than the accident. The cross-examination developed little of moment and no witness was called by the petitioner to support it. At the close of the case it was apparent that the attempted or suggested defense that respondent's condition was due to syphilis was without substance and was formally abandoned by petitioner's counsel in his address to the jury. Thereafter, in his argument to the jury the plaintiff contended that the railroad was using syphilis as its defense and in vigorous and unwarranted language aroused the prejudice of the jury. The Court did not attempt in any way to suppress such argument. Respondent has no quarrel with the principle announced therein but contends that it is not applicable to the instant case where the Court not only suppressed the complained-of conduct but also gave an instruction to the jury with respect to the necessity for calling witnesses.

Appellant cites the cases of *State v. Mageska*, 119 Ore. 314, 249 Pac. 364, 366; *State v. Helms*, 218 N. Car. 592, 12 S. E. 2d 243; *State v. Watson*, 215 N. Car. 387, 1 S. E. 2d 886; and *State v. Shouse*, 188 Mo. 473, 87 S. W. 480, to support his contention, stating that such conduct has been held to be reversible error in those states. None of the cases cited involves due process and we are not here conecrned with the rulings of the courts of other states as to misconduct.

Holden v. Hardy, supra (169 U. S. 366);

Hurtado v. State of Calif., supra (110 U. S. 516).

There are ample rulings on this subject in the decisions of the courts of the State of California.

In answer to appellant's fourth contention, it may be stated that his title is a clear misstatement of the holding of the Supreme Court of the State of California. That Court did not hold that the jury had the right to infer guilt from the failure of the defendant to produce his wife as a witness but specifically condemned such action or such innuendo. What the Supreme Court of the State of California did hold was that even though the conduct of the District Attorney was "improper and unwarranted" the guilt of the defendant was so obvious that it could "not rightly be held that the claimed misconduct was so improper as to require a reversal."

Upon the record and for the reasons hereinabove stated, we sincerely believe and it is respectfully prayed that the writ prayed for herein should be denied.

Respectfully submitted,

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